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CASE NO. 86-344

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE STATE OF OHIO,
MARK HOLDERMAN, AND KENNETH COX,

Appellants,

v.

FLEET AEROSPACE CORPORATION,

Appellee.

On Appeal From
The United States Court Of Appeals For
The Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION OF APPELLEE FLEET AEROSPACE CORPORATION TO DISMISS OR AFFIRM

JOHN J. CHESTER
Counsel of Record

RODERICK H. WILLCOX
J. ANTHONY KINGTON
Chester, Hoffman & Willcox
Eight East Broad Street
Columbus, Ohio 43215
(614) 221-4000

Attorneys for Appellee
Fleet Aerospace Corporation

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Fleet Aerospace Corporation ("Fleet") submits this supplemental brief, in support of its motion to dismiss the appeal or summarily affirm the unanimous decision of the Sixth Circuit, in order to clarify the procedural history of this appeal in light of certain statements made by Appellants ("the State of Ohio" or "the State") in their reply to Fleet's motion.

In an attempt to bolster its contention that the State of Ohio has standing to pursue this appeal, the State has alleged that, based upon a stipulation of the parties, the decision below of the Sixth Circuit was a judgment on the merits which will preclude the State from relitigating the constitutionality of O.R.C. § 1701.831 in the future. State's Reply to Appellee's Motion to Dismiss or Affirm at 6. The State is wrong. A brief

review of the procedural history of this case establishes that the State has taken out of context the Sixth Circuit's statement concerning its consideration of "the merits of the appeal." When the Sixth Circuit stated that it was deciding the appeal on its merits, it was undoubtedly referring to the merits of the expedited appeal concerning the preliminary injunction, the only "merits" before it,[1] in contradistinction to merely ruling on the numerous motions that were then pending before that court.

On June 11, 1986 the district court preliminarily enjoined the State and Aeronca Inc. ("Aeronca") from taking any action to enforce O.R.C. § 1701.831 against Fleet. Both the State and Aeronca immediately filed notices of appeal and moved the district court for an order, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, enjoining Fleet from consummating its tender offer pending appeal. On June 12 the district court denied the motion of the State and Aeronca (the "June 12 Order"). To allow the State and Aeronca to apply to the Sixth Circuit for a stay pending appeal, however, the district court restrained Fleet from purchasing shares for twenty-four hours. The June 12 Order provided that, if such application was made to the Sixth Circuit within twenty-four hours, the restraint on purchasing would remain in effect until that court ruled on the injunction application. The district court also restrained Fleet from voting any shares it acquired pursuant to the tender offer until further order of the Sixth Circuit or the district court. (State's App. at A-3-4.)[2]

The following day, June 13, both the State and Aeronca filed motions in the Sixth Circuit for a stay pending appeal. (State's App. at A-4.) In addition, on the same day Fleet filed a motion with the Sixth Circuit seeking an order vacating the June 12 Order.

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[1] See State's Notice of Appeal, attached hereto at Appendix A-1-2.

[2] In addition, the district court ordered that all parties seek an expedited appeal. On June 13, 1986 both Fleet and the State moved in the Sixth Circuit for expedited consideration of the appeal.

On Monday, June 16, Fleet and Aeronca advised the district court that Aeronca's board of directors had accepted Fleet's revised tender offer, and that Aeronca's directors had agreed to recommend the proposal, and a subsequent merger, to its shareholders.[3] In addition, Aeronca filed a motion with the Sixth Circuit for leave to withdraw its motion for an injunction pending appeal. On June 17, Fleet and Aeronca filed a joint motion with the Sixth Circuit for an emergency order vacating that part of the June 12 Order which restrained Fleet from purchasing and voting shares of Aeronca, or, in the alternative, for an order remanding that part of said order to the district court. *Id.*

Thus, in addition to the appeal of the district court's preliminary injunction order, five matters were pending before the Sixth Circuit when it heard oral argument on June 24, 1986:

> 1) Motion of Fleet for an emergency order vacating the June 12 Order;
>
> 2) Motions of the State and Aeronca for an injunction pending appeal;
>
> 3) Motion of Aeronca to withdraw its motion for an injunction pending appeal;
>
> 4) Joint motion of Fleet and Aeronca to vacate the restraining order, or, in the alternative, to remand to the district court; and,
>
> 5) Motions of Fleet and the State for expedited consideration of the appeal of the district court's or-

[3] On June 16 both Fleet and Aeronca jointly moved in the district court to set aside the restraints in the June 12 Order so that Fleet could proceed with the purchase and voting of tendered shares. The State objected to the joint motion, arguing that this request was already before the Sixth Circuit. The district court declined to take any action, deferring to the jurisdiction of the Sixth Circuit. (State's App. at A-4.)

der preliminarily enjoining the State and Aeronca from enforcing O.R.C. § 1701.831 against Fleet.[4]

In a June 19 letter from the Chief Deputy Clerk of the Sixth Circuit to all counsel of record concerning oral argument on June 24, the parties were informed that:

> Argument will be primarily devoted to the motion of the state of Ohio for an injunction pending appeal; the panel will also hear argument addressed to the joint motion for remand to the district court. Although the panel has not determined at this time whether it will reach *the merits of the appeal*, counsel may wish to be prepared to address those issues as well.

(Appendix at A-3) (emphasis added). Undoubtedly, the Chief Deputy Clerk's use of the phrase "merits of the appeal" referred to the appeal from the preliminary injunction.

Similarly, a transcript of the oral argument before the Sixth Circuit on June 24, establishes that the court's consideration of the merits of the appeal merely concerned the appeal from the preliminary injunction:

> J. Kennedy: Counsel, before we begin the argument in this case, *is there any reason why the Court cannot at this time hear the appeal of the injunction on its merits?* We didn't make it too clear to you whether we were doing that, but *the Judges have spent considerable time and the briefs seem to be complete enough, to us at least, to consider the merits of the appeal on — the injunction appeal —* Mr. Griswold?

[4] Prior to the oral argument on June 24, both Fleet and the State submitted briefs to the Sixth Circuit addressing the substantive merits of the appeal of the preliminary injunction issued by the district court against enforcement of O.R.C. § 1701.831.

Mr. Griswold:	Speaking for the appellant, State of Ohio, we would welcome a hearing on the merits, but would suggest that there should be an additional amount of time above the 15 minutes already allocated for the motions.
J. Kennedy:	Well, we will probably give it some additional time because of the issues in the case in any event. Yes, Mr. Chester?
Mr. Chester:	May it please the Court, we have no objection to proceeding at this time on the merits and would encourage the Court to do so.

(Emphasis added.)[5]

Finally, in its June 25, 1986 opinion, the Sixth Circuit set forth the procedural background of the case, and then summarized the matters pending before it. It is clear, once again, from a full reading of the relevant paragraphs that the court's discussion of "the appeal on its merits" refers solely to the appeal from the granting of the preliminary injunction:

> This court granted expedited consideration of the matters before it and set the case for a prompt hearing. Before us for consideration are Fleet's and Aeronca's motions for an emergency order vacating the order of the district court, and later a joint motion of Fleet and Aeronca to vacate or to remand to the district court the issues with respect to injunctive relief (and the brief in opposition by the State of Ohio). We are advised that the revised tender offer has been extended to June 30, 1986. The State of

[5] This colloquy is taken from Fleet's transcription of a tape of the oral argument provided by the Clerk of the Sixth Circuit.

> Ohio seeks an order of this court setting aside the declaration that the Ohio Control Share Acquisition Act is unconstitutional and appeals from the injunction precluding its enforcement in this case.
>
> At the oral argument counsel for all parties have requested that this court consider the expedited appeal on its merits, not merely the questions of the nature, extent and propriety of injunctive relief heretofore granted by the district court and the questions of staying that action or granting further injunctive relief by this court. The parties have submitted extensive briefs on the injunctive relief issues and on the merits of the constitutionality of the Ohio Control Share Acquisition Act. Counsel addressed fully at oral argument the constitutionality of the Ohio law at issue.

(State's App. at A-4.)

The Sixth Circuit did indeed affirm the granting of a preliminary injunction against enforcement of O.R.C. § 1701.831. Nowhere, however, did it indicate that it was treating this as an appeal from a declaratory judgment, which had not been rendered below, or that it was issuing a final decision concerning the constitutionality of the statute. Thus, under well settled law, there will be no *res judicata* effect to the Sixth Circuit's determination. The State does not have standing to pursue this appeal based upon any purported *res judicata* impact on any sovereign interest in upholding the constitutionality of its statute.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the motion submitted to this Court on October 17, 1986, this Court should dismiss the appeal docketed by the State, or in the alternative, summarily affirm the unanimous decision of the Sixth Circuit.

Respectfully Submitted,

JOHN J. CHESTER
Counsel of Record

RODERICK H. WILLCOX
J. ANTHONY KINGTON
Chester, Hoffman & Willcox
Eight East Broad Street
Columbus, Ohio 43215
(614) 221-4000

Attorneys for Appellee
Fleet Aerospace
Corporation

Dated: November 5, 1986

APPENDIX

TABLE OF CONTENTS

A-1 Notice of Appeal of State from district court's order granting Fleet's motion for a preliminary injunction.

A-3 Letter dated June 19, 1986 from Leonard Green, Chief Deputy Clerk of the United States Court of Appeals for the Sixth Circuit, to John J. Chester, Esq., James M. Hall, Jr., Esq., Sylvia B. Robbins-Penniman, Esq., and John W. Zeiger, Esq.

CIVIL ACTION NO. C2-86-0556

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

FLEET AEROSPACE CORPORATION,

Plaintiff,

—against—

MARK HOLDERMAN, *et al.*,

Defendants.

Judge Holschuh

NOTICE OF APPEAL OF STATE DEFENDANTS

Notice is hereby given that defendants the State of Ohio, Mark Holderman and Kenneth Cox hereby appeal to the United States Court of Appeals for the Sixth Circuit from this Court's order dated June 11, 1986 granting plaintiff Fleet Aerospace Corporation's motion for preliminary injunction.

Dated: June 11, 1986

Anthony J. Celebrezze, Jr.
ATTORNEY GENERAL
OF OHIO

By: Sylvia B. Robbins-Penniman
Assistant Attorney General
Room 1680
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-8614

John W. Zeiger,
Trial Attorney
Erwin N. Griswold
H. Theodore Meyer
Leigh B. Trevor
John W. Edwards II
Robert S. Walker
JONES, DAY,
REAVIS & POGUE
1900 Huntington Center
Columbus, Ohio 43215
(614) 469-3939

Special Counsel to the
Attorney General of
Ohio

Attorneys for Defendants:

State of Ohio

Mark Holderman, Acting Commissioner of the Division of Securities of the Department of Commerce of the State of Ohio

and

Kenneth Cox, Director of Commerce of the Department of Commerce of the State of Ohio

June 19, 1986

John J. Chester, Esq.
James M. Hall, Jr., Esq.
Sylvia B. Robbins-Penniman, Esq.
John W. Zeiger, Esq.

Re: No. 86-3533
Fleet Aerospace Corp. v.
Mark Holderman, et al.

Dear Counsel:

This letter will confirm our telephone conversation of Thursday, June 19, 1986, during which you were advised that the above-captioned matter has been scheduled for oral argument on Tuesday, June 24, 1986, at 1:00 p.m., in Cincinnati.

Argument will be primarily devoted to the motion of the state of Ohio for an injunction pending appeal; the panel will also hear argument addressed to the joint motion for remand to the district court. Although the panel has not determined at this time whether it will reach the merits of the appeal, counsel may wish to be prepared to address those issues as well.

All of the pleadings filed with this office by the parties have been forwarded to the Court. If you wish to file brief memoranda supplementing those already on file, particularly addressing the issue of remand, you may do so. Any such supplemental memoranda should be filed with this office by 9:00 a.m. Monday, June 23.

Counsel who will be appearing at oral argument should check in at the clerk's office in Room 524 one half-hour before argument.

Very truly yours,

Leonard Green
Chief Deputy Clerk